LIBERTY INSURANCE BHD v. MARRISON SIDAI & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
MOHD NAZLAN GHAZALI J
[ORIGINATING SUMMONS NO: WA-24NCC-475-11-2017]
28 JUNE 2018

INSURANCE: *Motor insurance – Construction of policy – Road accident occurred between motor vehicle and motorcycle – Motor vehicle driver took insurance after accident occurred – Whether proper conduct – Whether act of potential fraudulence – Whether coverage provided under insurance policy had retrospective effect – Whether insurer made inquiries into insured driver before granting insurance policy – Road Transport Act 1987, s. 96(3)*

INSURANCE: *Construction of policy – Cover note – Road accident occurred between motor vehicle and motorcycle – Motor vehicle driver took insurance after accident occurred – Cover note stated date and time of insurance coverage while certificate of policy stated period of coverage – Whether cover note formed part of insurance policy – Whether date and time stated in insurance coverage to be taken into account in determining period of coverage – Whether coverage under insurance policy took retrospective effect – Whether coverage started from midnight of issuance date – Road Transport Act 1987, ss. 2 & 89*

CONTRACT: *Privity – Insurance policy – Road accident occurred between motor vehicle and motorcycle – Motor vehicle driver took insurance after accident occurred – Whether coverage provided under insurance policy had retrospective effect – Whether insurance policy also covers rider of motorcycle – Whether there was privity of insurance contract between insurer and rider of motorcycle – Whether motorcycle rider, as third party, could benefit from insurance coverage contract between insurer and insured – Road Transport Act 1987, ss. 91 & 96*

A road accident occurred on 19 May 2016, at 12pm, involving the motor vehicle ('vehicle') owned by the first defendant and the motorcycle ridden by the second defendant. In the present application, the plaintiff sought for a declaration, pursuant to s. 96(3) of the Road Transport Act 1987 ('RTA'), that the insurance policy, which provided coverage for the vehicle for the period between 19 May 2016, from 2.51pm, and 18 May 2017, was void and unenforceable. In support of its application, the plaintiff submitted that (i) it was entitled to repudiate the policy since the same was issued to the first defendant, upon payment of the requisite premium for coverage under the policy which had been made after the accident; (ii) the policy only provided coverage *vis-à-vis* the accident in favour of the first defendant, who was the policyholder, and any driver of the vehicle authorised by the policyholder; and (iii) the second defendant was not privy to the contractual relationship between the plaintiff and the first defendant as the insured and policyholder. The second defendant, on the other hand, argued that (i) the coverage under the policy took effect from midnight of 19 May 2016 such that the accident,

which occurred earlier on that same day at 12pm, accordingly fell within the coverage period of the policy. In other words, the coverage took retrospective effect from the very start of the day on 19 May 2016; (ii) the time of commencement of coverage was not stated in the certificate of the schedule to the policy and in the schedule, it was simply stated that the period of the policy was 19 May 2016 to 18 May 2017; and (iii) the case of *Mohd Faiz Zulkifli & Anor v. Etiqa Takaful Bhd* ('*Mohd Faiz Zulkifli*') supported the proposition on retrospective commencement of the policy, from midnight of the issuance date even though the cover note was issued later in the day and subsequent to the event of the accident.

Held (allowing application):

(1) The plaintiff had successfully established its case, for the declaration under s. 96(3) of the RTA, that the policy with the first defendant, concerning the vehicle, was void and unenforceable. (para 74)

(2) The words in an insurance policy ought to be construed according to their plain and ordinary meaning. The rule of construction favouring the plain and ordinary meaning is however subject to the intention of the parties and the object of the insurance policy. The exception to the plain and ordinary meaning approach would only be applicable if the terms in question have acquired a peculiar sense distinct from the popular sense of the same terms, or where the context of the policy suggests that, to effectuate the immediate intention of the contracting parties, such terms should be construed and understood in some other special sense. (paras 13 & 15)

(3) The cover note was clear. The language could not have been more specific; the coverage started from 2.51pm on 19 May 2016. The cover note was part of the policy. Section 2 of the RTA states that 'certificate of insurance includes a cover note' while s. 89 of the RTA provides that 'policy of insurance' includes the cover notes. Just because the certificate did not specify the time of 2.51pm, it did not necessarily follow that what was so definitively specified in the cover note was of no relevance. Furthermore, nowhere in the documents forming the policy was there mentioned that coverage became effective from midnight. The construction of the pertinent provisions in these documents did not aid the second defendant's case. (paras 17 & 20)

(4) In *Mohd Faiz Zulkifli*, despite the payment by the insured of the policy premium after the accident, the failure of the insurer to have inquired into the true facts constituted a waiver that disapplied the principle of the utmost good faith. It was not correct, either in principle, policy or especially in law that the duty of utmost good faith on the part of the insured in disclosing what should be the most important fact of the intended policy coverage could be so easily displaced by the failure of

the insurer to make the necessary inquiries that could have allegedly ascertained the truth. Little is achieved if the requirement is only for the insurer to show it had made inquiries with the insured if the latter, intent on committing fraud by virtue of the deliberate act of applying after the event, would almost certainly and not surprisingly conceal the truth. When faced with a potential fraud, the requirement of making inquiries is close to being meaningless. (paras 31, 32 & 36)

(5) Even though no evidence was produced, it could be safely assumed that the first defendant had been asked to answer specific questions in the online application. In any event, the conduct of the first defendant applying for a policy coverage after the happening of the very event intended to be insured against surely could be argued to be nothing but a patent attempt to engage in an improper conduct. It was potentially fraud; pure and simple. Just because the insurer 'did not ask', if indeed the plaintiff did not, could not be a legitimate basis for the law to permit the wrongdoing to continue to be perpetuated, or at least for the insured to benefit from it. (paras 33 & 34)

(6) Under para. 5(9) of Schedule 9 to the Financial Services Act 2013 ('FSA'), the duty of the utmost good faith on the part of both the insured and the insurer, in respect of the dealings with one another, continues unaffected by the provisions of the Schedule. Thus, the first defendant would continue to be under the duty to make the requisite disclosure in adherence to the duty of utmost good faith, even after the policy had been issued. Accordingly, given the clear requirements of Schedule 9 to the FSA, it could no longer be the law that failure to ask the potential insured to answer pre-qualification questions necessarily waives the insured's disclosure obligation under the duty of the utmost good faith. As such, the findings in *Mohd Faiz Zulkifli* could not be applied with equal force to the present case. (paras 41, 42 & 44)

(7) It is trite, as it is only business common sense, that coverage for the insured should logically be made effective in consideration of and in exchange for payment or premium to the insurer for the latter to properly assume the relevant risk. Section 84 of the FSA is explicit in making this prescription. At the time of the accident, at around noon on 19 May 2016, the premium payment had yet to be made. An insurer, such as the plaintiff, was thus prohibited from assuming any such risk to provide insurance coverage. This was also in consonance with the widely accepted industry practice of adopting the practice of adopting 'the cash before the cover' basis in respect of motor vehicle insurance, where premium must be paid before such insurance cover note could be issued. (paras 46-48)

(8) The specified event of a motor vehicle accident intended to be insured against was far from being uncertain. It had, in actual fact, become an absolute certainty because it had occurred before coverage became effective in terms of the timing of the application for coverage and payment of premium which was manifestly subsequent in time. When the first defendant applied for coverage, the accident had already occurred. The contract of insurance could not have been validly created under such circumstances in the absence of uncertainty of the specified event. (para 50)

(9) It is a basic rule of the law of the contract that the rights and obligations concerning an agreement do not concern a third party. A third party, like the second defendant, could not benefit from, nor sue, on the contract of insurance which existed between the plaintiff and the first defendant. This was a fundamental, as it was rudimentary, basis that rendered the second defendant's resistance to be short on substance. That is not to say that the second defendant was entirely irrelevant to the proceedings. Section 96 of the RTA also confers the third party, the second defendant, to apply to be made a party and to oppose the granting of such declaration. Section 96(3) of the RTA further confers the second defendant such right to contest the declaration despite the patent absence of any contractual relationship between the plaintiff, as the insurer, and the second defendant, as the third party. However, the ends of justice in the balance of competing interests to be determined in the context of s. 96 of the RTA was better served, given the circumstances of the present case, with the granting of the declaration avoiding contract between the plaintiff and the first defendant. (paras 61, 64, 66 & 71)

Obiter:

(1) In such a case where the insurance contract is declared void under s. 96(3) of the RTA, the third party who is successful in the liability proceedings against the insured is not entirely without remedy. A third party who obtained judgment against a driver without any policy coverage or with ineffective policy, such as where the insurance is obtained fraudulently or through misrepresentation or non-disclosure of material fact, may look to the Motor Insurer's Bureau for some compensation payment under s. 91 of the RTA. (para 72)

Case(s) referred to:

Ahmad Nadzrin Abd Halim & Anor v. Allianz General Insurance Company (M) Bhd [2015] 9 CLJ 821 CA ***(refd)***

Dancom Telecommunication (M) Sdn Bhd v. Uni Asia General Insurance Bhd [2008] 5 CLJ 551 CA ***(refd)***

Hameed Jagubar Syed Ahmad v. Pacific & Orient Insurance Co Bhd [2017] 10 CLJ 278 CA ***(refd)***

Kepong Prospecting Ltd & Ors v. Schmidt [1967] 1 LNS 67 PC ***(refd)***

Malaysia British Assurance Bhd v. Syarikat Pembenaan Karun Sdn Bhd [2009] 4 CLJ 1 CA ***(refd)***
Manoharan Ramalingam v. Liberty Insurance Bhd [2017] 9 CLJ 468 HC ***(refd)***
Mohd Faiz Zulkifli (A Minor Suing Through His Father And Next Of Kin; Zulkifli Awang Kechik) & Anor v. Etiqa Takaful Bhd [2016] 5 CLJ 679 HC ***(refd)***
Pacific & Orient Insurance Co Bhd v. Rasip Hamsudi & Ors [2017] 4 CLJ 572 CA ***(refd)***
Syarikat Uniweld Trading v. Asia Insurance Co Ltd [1996] 3 CLJ 142 HC ***(refd)***
Tweddle v. Atkinson [1861] 1 B & S 393 ***(refd)***

Legislation referred to:
Financial Services Act 2013, s. 84, Schedule 9 paras 5(1), (3), (8), (9), 6(1)(a)
Road Transport Act 1987, ss. 2, 89, 91, 96(1), (2), (3)

For the plaintiff - Rueben Netto & JS Naicker; M/s Naicker & Assocs
For the 2nd defendant - Khairul Aiman; M/s G Dorai & Co

Reported by Najib Tamby

JUDGMENT

Mohd Nazlan Ghazali J:

Introduction

[1] This is the plaintiff's application, by way of an originating summons, for a declaration pursuant to s. 96(3) of the Road Transport Act 1987 ("the RTA") that Policy No: PMMA-519518 which provided insurance coverage for motor vehicle no: WVY 3851 ("the vehicle") for the period between 19 May 2016 (specifically from 2.51pm) and 18 May 2017 ("the policy") is void and unenforceable with respect to a road accident which occurred on 19 May 2016 (at around 12 noon) involving the vehicle and motorcycle no. WWU 5936 claimed to be ridden by the second defendant ("the accident").

[2] At the end of the hearing of the originating summons, I allowed the application. This judgment contains the full reasons for my decision, and reaffirms the established principle that coverage can only be effective upon payment of premium.

Key Background Facts

[3] The first defendant is the registered owner of the vehicle at the time of the issuance of the policy by the plaintiff. He still is. He is also the insured and policyholder.

[4] The plaintiff was served with a notice pursuant to s. 96(2) of the RTA in relation to the accident, whereby the second defendant had now instituted a civil action in the Sessions Court in Kuala Lumpur (WA-A53KJ-310-07-2017) to claim general and special damages arising from the accident against the first defendant.

[5] The Sessions Court has since, at the instance of an intervener application brought by the plaintiff in that suit, stayed the said action pending the outcome of the instant application before me.

The Essence Of The Contentions Of The Parties

[6] The most contentious issue which arises from the resistance by the second defendant to this application is easily defined. The plaintiff argues that it is entitled to repudiate the policy since the policy was issued to the first defendant, upon payment of the requisite premium for coverage under the policy which had been made, after the accident. Specifically, the relevant cover note for the policy stated that coverage commenced at 2.51pm on 19 May 2016, whilst the accident occurred at around noon on the same day of 19 May 2016.

[7] Secondly, the plaintiff also maintains that the policy only provides coverage *vis-à-vis* the accident in favour of the policyholder, being the first defendant and any driver of the vehicle who is authorised by the policyholder. The plaintiff submits that the second defendant is not privy to the insurance contractual relationship between the former and the first defendant as the insured and policyholder.

[8] It is to be noted that being the insured and policyholder, the first defendant did not however file any affidavit to respond to this application, which is instead resisted only by the second defendant. The first defendant in fact concedes liability to the declaration now sought by the plaintiff.

[9] The second defendant, on the other hand, contends that the coverage under the policy took effect from midnight of 19 May 2016, and not later in the same day at 2.51pm as asserted by the plaintiff, such that the accident which occurred earlier on that same day at 12pm accordingly fell within the coverage period of the policy. In other words, the second defendant submitted that the coverage took retrospective effect from the very start of the day on 19 May 2016.

Evaluation And Findings Of This Court

Construction Of Contract Is A Question Of Law

[10] The overarching issue raised in this appeal pertains to the proper interpretation of the policy, including in particular the relevant cover note. It therefore concerns the construction of contract. It is as such apposite for me to reaffirm the important rule that the law vests in the courts the power to interpret contracts and legal documents.

[11] In *Manoharan Ramalingam v. Liberty Insurance Bhd* [2017] 9 CLJ 468 I stated the following:

> [19] It is rudimentary that the evidence given by witnesses on the interpretation of such contracts and documents is largely irrelevant if not entirely inconsequential. In *Leong Ah Kew & Ors v. Prisma Suria Sdn Bhd* [2015] 8 CLJ 300, I had said thus:

> [8] Common law has established a number of important principles in the interpretation of contracts, one of which, especially relevant for present purposes is that the construction of contract is a question of law for determination by the court and not by witnesses through their evidence. In *Bahamas International Trust Co Ltd v. Threadgold* [1974] 1 WLR 1514, Lord Diplock stated the following:
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> > In a case which turns, as this one does, on the construction to be given to a written document, a court called on to construe the document in the absence of any claim to rectification, cannot be bound by any concession made by any of the parties as to what its language means. That is so even in the court before which the concession is made; a *fortiori* in the court to which an appeal from the judgment of the court is brought. The reason is that the construction of a written document is a question of law. It is for the judge to decide for himself what the law is, not to accept it from any or even all the parties to the suit; having so decided it is his duty to apply it to the facts of the case. He would be acting contrary to his judicial oath if he were to determine the case by applying what the parties conceived to be the law, if in his own opinion it were erroneous.
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> [9] This has since been emphatically followed in Malaysian cases, such as in the Court of Appeal decision in *NVJ Menon v. The Great Eastern Life Assurance Company Ltd* [2004] 3 CLJ 96; [2004] 3 MLJ 38.

[12] As such, as a case in point, what the litigants considered to be their understanding as to the effect of the various clauses of the policy in contention is of little, if any, consequence to the interpretation of the same. The interpretation of the policy is a question of law.

[13] In addition, it is equally well settled, such as made clear by the Court of Appeal in *Malaysia British Assurance Bhd v. Syarikat Pembenaan Karun Sdn Bhd* [2009] 4 CLJ 1 that the words in an insurance policy ought to be construed according to their plain and ordinary meaning. The rule of construction favouring the plain and ordinary meaning is however subject to the intention of the parties and the object of the insurance policy. Ahmad Maarop JCA (now CJ (Malaya)) thus said:

> [21] That a policy of insurance is basically subject to the same rules of construction as any other written contract is abundantly clear from the authorities. In the words of Hashim Yeop A Sani FJ delivering the judgment of the Federal Court in *Provincial Insurance Co Ltd v. Yee Chee Swee*:
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> > the words used in it must be given their plain, ordinary meaning but in the context of the policy looked at as a whole and subject to any special definition contained in the policy.

A [22] The rule that the policy, like all other instruments, is to be construed according to its sense and meaning, as collected from the words used in it, which are to be understood in their plain and ordinary meaning was established as early as in 1803 in *Roberton v. French* [1803] 4 East 130. That the words in the policy is to be understood in their plain, ordinary and popular sense is subject to a number of exceptions, one of which being
B that the context evidently points out that the words must in the particular instance, and in order to effectuate the immediate intention of the parties to the contract, be understood in some other special or peculiar sense. This is clear from the judgment Lord Ellenborough CJ stated in that case: ...

C [23] In construing the policy, the object of the parties is to be steadily borne in mind and the policy must not be construed so as to defeat that object, nor as to render it practically illusory. This was stated by Lindley LJ, delivering the judgment of the English Court of Appeal in *Cornish v. The Accident Insurance Company Ltd.* [1889] QBD Vol. XXIII, 453 ...

D **[14]** It is quite manifest from the above judicial pronouncement that the exception to the plain and ordinary meaning approach would only be applicable if the terms in question have acquired a peculiar sense distinct from the popular sense of the same terms, or where the context of the policy suggests that to effectuate the immediate intention of the contracting parties, such terms should be construed and understood in some other special sense.
E

[15] Does this mean that the relevant clauses on the commencement of the effectiveness of the policy include terms which have acquired a peculiar meaning which is different from its ordinary sense? I do not think so. The question in this case is simply one of when exactly does coverage commence.

F *The Relevant Clauses*

[16] The provisions in the relevant clauses are straightforward enough. The cover note to the policy stated the following:

G having proposed for insurance and paid premium in respect of the Motor Vehicle described in the Schedule below the risk is hereby HELD COVERED in the terms of the Company's usual form of Comprehensive Policy applicable thereto for the period from 2.51pm on 19/05/2016 to midnight on 18/05/2017.

[17] This clause is clear. The language could not have been more specific. The coverage started from 2.51pm on 19 May 2016.
H

[18] But, the second defendant argued that the time of commencement of coverage was not stated in the certificate or the schedule to the policy, and highlighted that what was mentioned in the certificate and in the schedule was simply this:

I Period of insurance: 19 May 2016 to 18 May 2017

[19] This contention of the second defendant is not wholly accurate. The schedule did mention 19 May 2016 at 2.51pm being the date and time of the item on the "date of signature of proposal and declaration".

[20] I do not think the argument of the second defendant that the policy started from midnight on 19 May 2016 because the time of 2.51pm mentioned in the cover note was not repeated in the certificate of insurance to be particularly convincing. In the first place, it cannot be disputed that the cover note is part of the policy. Section 2 of the RTA states that "certificate of insurance" includes a cover note. And s. 89 of the same Act also provides that "policy of insurance" includes the cover notes. Secondly, just because the certificate did not specify the time of 2.51pm, it does not necessarily follow that what was so definitively specified in the cover note is of no relevance. Thirdly, nowhere in the documents forming the policy is there mention that coverage became effective from midnight. In other words, the construction of the pertinent provisions in these documents does not aid the case of the second defendant.

The Case-law Authorities

[21] The contention of the second defendant however is heavily reliant on a number of case law authorities which have considered the same question previously, and which, according to the second defendant, support the position now taken by the second defendant.

[22] He maintains therefore that, like in the instant case, a policy of insurance which was not in existence at the time of the accident, and issued by the insurer only after the accident, but by its terms cover the date of the accident, is enforceable and not void under s. 96(3) of the RTA, on the basis that the effectiveness of the policy commenced several hours earlier, retrospectively from midnight, instead of from 2.51 pm on the same 19 May 2016.

[23] In the most recent case of *Hameed Jagubar Syed Ahmad v. Pacific & Orient Insurance Co Bhd* [2017] 10 CLJ 278; [2017] 6 MLJ 618, the accident occurred at around 1.30am on 27 October 2011, and the policy of insurance issued several hours later at 2.16pm on the same date of 27 October 2011. The Court of Appeal reversed the decision of the High Court which had granted the declaration under s. 96(3) of the RTA.

[24] The Court of Appeal ruled that although the schedule stated the date and time of the policy, the period of insurance itself was specified to be from 27 October 2011 until midnight of 26 October 2012. Thus the policy became effective from the date it came into existence which was at midnight and not when the policy was actually issued. For clarity, the relevant passages of the judgment of the Court of Appeal are reproduced below:

> [15] What is however of particular significance is that although the schedule to the policy states the time and date of the policy as '27-10-2011 2.16 pm', the period of insurance is stated as from 27 October 2011 until midnight of 26 October 2012. The same appears in the certificate of insurance No 017011PFN002610 where the effective date of commencement of insurance was 27 October 2011 and the date of expiry

A was 26 October 2012. Since only the date of commencement of cover is mentioned without specifying any particular time of commencement, would such a policy cover the time of the accident retrospectively?

...

B [27] Reverting to the instant case, and as alluded to earlier, although the schedule to the policy states the time and date of the policy as '27-10-2011 2.16 pm', the period of insurance is stated as from 27 October 2011 until midnight of 26 October 2012. The same appears in the certificate of insurance No 017011PFN002610 where the effective date of commencement of insurance was 27 October 2011 and the date of expiry was 26 October 2012. Since only the date of commencement of cover is C mentioned without specifying any particular time of commencement, we agree that the policy becomes effective when the date comes into existence at midnight and not when the policy was issued.

[25] Whilst the decision is clear, it is no less significant that the Court of Appeal did emphasise that the ruling was based on the construction of the D provisions of the policy in question, and even postulated that the policy could have been made to come into effect from the time of the issuance of the relevant cover note if the same was expressly specified to such effect in the certificate and the schedule. Thus, it was held:

E [28] We should add that this is purely a question of construction of the relevant clauses in the policy. It was open to the insurer to have stipulated that the policy becomes effective from the time it was issued but this was not the case here. By the terms of its own contract, the policy has become effective

F **[26]** The other reason why *Hameed Jagubar* was decided the way it was also has to do with the question of the wide interpretation of the phrase 'insurer concerned' contained in the MIB Agreement (the Motor Insurers' Bureau agreement) relevant to that case, to the extent that it was held that the issue of breach of duty of utmost good faith on the part of the insured could not succeed. This was not an issue in the instant case before me.

G **[27]** The relevant passages on this point from the judgment of the Court of Appeal in *Hameed Jagubar* read as follows:

[42] One of the key aspects of the MIB Agreement is the provision for the insurer to satisfy any judgment in respect of liability insured under compulsory insurance legislation. In this respect, Clause 3(a) of the MIB H Agreement provides:

> If a judgment is obtained in Malaysia against any person (hereinafter referred to as the "Judgement Debtor") in respect of liability required to be insured by the Compulsory Insurance Legislation the Insurer Concerned will satisfy the Original I Judgement Creditor if and to the extent that the Judgement has not been satisfied by the Judgement Debtor within twenty eight days is entitled to enforce it.

[43] So, who is the "insurer concerned"? The definition of "insurer concerned" can be found in Clause 1 of the Agreement which reads:

> "Insurer concerned" means that Insurer who at the time of the accident which gave rise to a liability required to be insured by the Compulsory Insurance Legislation was providing an insurance against such liability in respect of the vehicle arising out of the use of which the liability of the Judgement Debtor was incurred. An Insurer is concerned within the meaning of this Agreement notwithstanding that:
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> (i) the insurance was arranged after the accident but purported to be effective at the time of the accident;
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> (ii) the insurance has been obtained by fraud, misrepresentation, non-disclosure of material facts or mistake... (the rest of the definition excluded for being irrelevant to the present appeal)
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> ...

[49] In the same context as well, eminent author S Santhana Dass in his recent article entitled "Backdated Cover notes and the Insurers' Liability under Section 96 of the Road Transport Act 1987" [2017] 1 LNS (A) xi opined that the MIB Domestic Agreement dated 1 January 1992 has tied the hands of the insurers with the wide encompassing definition of "insurer concerned". In this respect, we are in agreement with the learned author that, in the circumstances, the issue of non-disclosure or breach of duty of utmost good faith cannot succeed and liability of the insurer is apparent.

...

[28] The second defendant also referred to a number of High Court decisions which I do not deny seem to support the proposition on retrospective commencement of the policy from midnight of the issuance date even though the cover note was issued (upon payment of premium) later in the day, and subsequent to the event of the accident. Most of these cases have also been affirmed on appeal.

[29] One such decision is *Mohd Faiz Zulkifli (A Minor Suing Through His Father And Next Of Kin; Zulkifli Awang Kechik) & Anor v. Etiqa Takaful Bhd* [2016] 5 CLJ 679 where the High Court overturned the decision of the Sessions Court allowing the grant of a declaration for the insurer, where the headnotes, as highlighted by the second defendant in his written submissions, stated what was held by the High Court to be as follows:

> (1) In Etiqa Takaful's document entitled 'The Schedule' and 'Private Car Certificate', it was clearly stated that the insured period was between 23 April 2013 to 22 April 2014. It means that the policy begun at 12am midnight on 23 April 2013. The fact that the payment for the policy was made at 8.27pm on 23 April 2013 did not determine the period of the policy. In the circumstances, it was clear that the policy would cover the damage of the vehicle caused in the accident as well as a third party risks claim. (paras 18, 20, 25 & 27)

A (2) Etiqa Takaful's agent ought to make an inquiry because he would have known that the insured period will include a past period. In this instant case, Etiqa Takaful's agent took upon himself that everything was alright and accepted the payment without enquiring whether the vehicle to be insured had met any accident earlier in the day. In the event the insured person did not disclose the true facts to the agent when asked, then it B would tantamount to fraud which would be sufficient to render the policy void. If Etiqa Takaful's agent had asked, he would have discharged his responsibility. The omission is a waiver of right to information. Therefore, the principle of utmost good faith could not be applied. (paras 37-40)

(3) 'Insurance is a contract upon speculation ...', 'speculation' refers to C something which is not known to be a fact. In this instant case, an accident involving vehicle PGE 877 in the morning of 23 April 2013 is a fact. Etiqa Takaful could have easily discovered this fact. But, Etiqa Takaful accepted the premium and took the risk which could have been easily avoided. Therefore, Etiqa Takaful could not now disclaim any liability for its own carelessness or omission. (para 42)

D (4) The intention of Parliament is to ensure a party who suffers injury and damage to his property will be compensated through an insurance company against the party who is at fault. An insurance company plays an important role in this social organisation. To shield behind s. 96(3) of the Road Transport Act 1987 from liability to a third party risks claim is E against the spirit of the intention of Parliament. Etiqa Takaful should not be protected under s. 96(3) of the Road Transport Act 1987 for its own omission or carelessness which is tantamount to a waiver of information, Etiqa Takaful's also could not rely on the principle of utmost good faith. (para 44)

F **[30]** I am of the view that the aforesaid paragraphs in *Mohd Faiz bin Zulkifli* encapsulate the very crux of the key issues which are absolutely pivotal to the facts similar to the instant case that require greater appreciation. The first para. (1) above stated the facts which are not dissimilar to those in the instant case. No issue here.

G **[31]** The paras. (2), (3) and (4) of the headnotes in *Mohd Faiz bin Zulkifli* contain the crucial finding that despite the payment by the insured of the policy premium after the accident, the failure of the insurer to have inquired into the true facts constituted a waiver that dis-applied the principle of the utmost good faith.

H *Schedule 9 To The Financial Services Act 2013*

[32] In the instant case before me however, I do not think it is correct either in principle, policy or especially in law that the duty of utmost good faith on the part of the insured in disclosing what should be the most important fact of the intended policy coverage can be so easily displaced by I the failure of the insurer to make the necessary inquiries that could have allegedly ascertained the truth. I should add that there is no evidence either way as to whether the plaintiff had made the request for the first defendant to answer questions relevant to the intended coverage.

[33] However, at the hearing, counsel for the plaintiff submitted that the cover note was applied for and issued at a post office. Modern insurance industry practice now accepts online applications. In this regard, it should be mentioned that under para. 6(1)(a) of Schedule 9 to the Financial Services Act 2013 which applied to the policy in the instant case, it is stated that in determining whether an insured has taken reasonable care not to make a misrepresentation in answering questions posed by the insurance company, relevant circumstances that may be taken into account include the contract in question and the manner in which the contract was sold. It can thus be safely assumed that the first defendant had been asked to answer specific questions in the online application form but no evidence was produced to show the form in question, and how the first defendant answered them.

[34] In any event, the conduct of the first defendant applying for a policy coverage after the happening of the very event intended to be insured against surely can be argued to be nothing but a patent attempt to engage in an improper conduct. It is potentially a fraud pure and simple. Just because the insurer "did not ask" (if indeed the plaintiff did not) cannot be a legitimate basis for the law to permit the wrongdoing to continue to be perpetuated, or at least for the insured to benefit therefrom. I should emphasise however that the first defendant does not contest the instant application by the plaintiff.

[35] Additionally, in *Mohd Faiz bin Zulkifli*, it was held that non-disclosure by the insured to the insurance agent when asked would tantamount to a fraud, and that if the agent had asked, he would have discharged his responsibility. In my view, a fraud is a fraud. The fact that the party being defrauded failed to have done inquiries should not mean the fraud can be excused and transaction resulting therefrom enforced.

[36] Furthermore, little is achieved if the requirement is only for the insurer to show it had made inquiries with the insured if the latter, intent on committing the fraud by virtue of the deliberate act of applying after the event, would almost certainly, and not unsurprisingly concealed the truth. When faced with a potential fraud, the requirement of making inquiries is close to being meaningless. I accept that if the insured provided untrue answers to queries made by the insurance agent, the misrepresentation would be more manifest and more readily capable of rendering the policy void.

[37] However, in my view, the act of applying for a policy after an accident meant to provide the coverage is already so patently wrong. It does not have to be considered as wrongful and fraudulent only if the insured concealed the accident if and when asked by the agent.

[38] This is thus supported by the provisions of the Financial Services Act 2013 ("the FSA") which came into force after the policy in *Hameed Jagubar* became effective. *Hameed Jagubar* and the cases it referred to did not therefore have to consider the application of the FSA.

[39] Whilst sub-paras. (1) and (3) of para. 5 of Schedule 9 to the FSA on pre-contractual duty of disclosure do provide for the insured's duty of disclosure to be waived if the insurer chooses not to request the insured to answer specific questions relevant to the decision-making of the insurer whether or not to accept the risks and on the setting of the pertinent terms, sub-para. (8) nevertheless still imposes on the insured the duty to take reasonable care to disclose any matter that he knows to be relevant to the decision making of the insured.

[40] Subparagraph (8) reads as follows:

> (8) Subject to subparagraphs (1) and (3), a consumer shall take reasonable care to disclose to the licensed insurer any matter, other than that in relation to subparagraph (1) or (3), that he knows to be relevant to the decision of the insurer on whether to accept the risk or not and the rates and terms to be applied.

[41] Perhaps most significantly, it is in any event made explicit by para. 5(9) of Schedule 9 that the duty of the utmost good faith on the part of both the insured and the insurer in respect of the dealings with one another continues unaffected by the provisions of the Schedule. Thus, the first defendant would continue to be under the duty to make the requisite disclosure in adherence to the duty of utmost good faith, even after the policy had been issued. The provision reads as follows:

> (9) Nothing in this Schedule shall affect the duty of utmost good faith to be exercised by a consumer and licensed insurer in their dealings with each other, including the making and paying of a claim, after a contract of insurance has been entered into, varied or renewed.

[42] Accordingly, given the clear requirements of Schedule 9 to the FSA, it can no longer be the law that failure to ask the potential insured to answer pre-qualification questions necessarily waives the insured's disclosure obligations under the duty of the utmost good faith.

[43] This must be correct. For what is the point of giving effect to a contract of insurance which has been obtained irregularly? It is absolutely unacceptable for the court to countenance a state of affairs which has a clear effect of condoning or worse, even encouraging road users to drive without being in possession of road tax and insurance coverage until the occurrence of an accident. This is certainly a blatant violation of public policy at the same time.

[44] As such, the findings in paras. (2), (3) and (4) of the headnotes in *Mohd Faiz bin Zulkifli* cannot be applied with equal force to the case now before this court.

Essence Of Insurance Coverage

[45] And that is not all. There are a number of other reasons why the resistance of the second defendant to the declaration now sought by the plaintiff is difficult to sustain. And they all relate to the very essence of the concept of insurance coverage.

[46] First, it is trite as it is only business common sense that coverage for the insured should logically be made effective in consideration of and exchange for payment of premium to the insurer for the latter to properly assume the relevant risk. Again, the legislative provision in the FSA is explicit in making this prescription. Section 84 reads:

> Assumption of risk
>
> 84. (1) No licensed insurer shall assume any risk in respect of such description of policy as may be prescribed by the Bank unless and until the premium payable in received by the licensed insurer in such manner and within such time as may be prescribed by the Bank.

[47] It bears emphasis that at the time of the accident at around noon on 19 May 2016, evidence is uncontroverted that premium payment had yet to be made. An insurer such as the plaintiff in the instant case is thus under the law in the FSA prohibited from assuming any such risk to provide insurance coverage based on the plain language of s. 84 of the FSA.

[48] Secondly, this is also in consonance with the widely accepted industry practice of adopting "the cash before cover" basis in respect of motor vehicle insurance, where premium must be paid before such insurance cover note or policy can be issued.

[49] Thirdly, the overarching essence of an insurance contract must be properly recognised. The following passage from the judgment of Abdul Malik Ishak J (as he then was) in *Dancom Telecommunication (M) Sdn Bhd v. Uni Asia General Insurance Bhd* [2008] 5 CLJ 551 is especially instructive:

> [95] One may ask: what is a policy of insurance? Essentially, it is a contract and the rules governing contracts in general are applicable to a contract of insurance. Usually, a contract of insurance is made with reference to a specified event where the occurrence of which is uncertain. It is this uncertainty that forms the basis of the contract in that it insures against the risk of the occurrence of the specified event. Megarry VC in *Medical Defence Union Ltd. v. Department of Trade* [1979] 2 WLR 686 had this to say in regard to the characteristic of an insurance contract. This was what his Lordship said at p. 690 of the report (the relevant parts only):
>
> > First, the contract must provide that the assured will become entitled to something on the occurrence of some event ... Second, the event must be one which involves some element of uncertainty.

[50] In the instant case, the specified event of a motor vehicle accident intended to be insured against was far from being uncertain. It had in actual fact become an absolute certainty because it had occurred before coverage became effective in terms of the timing of the application for coverage and payment of premium which was manifestly subsequent in time. I emphasise that when the first defendant applied for coverage, the accident had already happened. The contract of insurance could not have been validly created under such circumstances in the absence of the uncertainty of the specified event.

[51] Yet, despite the headnote in para. (3) in *Mohd Faiz bin Zulkifli* giving recognition to the insurance contract being "a contract upon speculation", and with a reference to "something which is not known to be a fact", and that the accident in that case happened earlier in the morning, the High Court still found for the insured, for the principal reason that the insurer failed to find out that the accident had happened.

[52] Again, in my view, the element of uncertainty of the specified event (an accident involving the vehicle under insurance coverage) or the risk of it happening is absolutely fundamental and is a *sine qua non* to any valid creation of an insurance contract. Absent of the uncertainty or risk factor, the contract cannot be validly recognised as a contract of insurance.

[53] The issue of whether the insured concealed the fact of the accident or whether the insurer had caused relevant queries be asked of the insured that could have discovered the truth is also of little consequence when the facts are clear, as they palpably are in the instant case, that when the policy was first issued *via* the cover note, the accident, being the specified event in the motor vehicle insurance policy for which coverage is now demanded by the second defendant *via* third party claim, had already occurred about three hours earlier.

[54] It bears emphasis that at the time of the formation of the insurance contract (which was at the time the premium was paid at 2.51pm on 19 May 2016), the requisite element of risk or uncertainty in respect of the accident now forming the basis of the claim for indemnity by the second defendant was manifestly absent.

[55] The claim by the second defendant which is predicated on the accident, which accident was as a matter of undisputed fact already a certainty at the stage of the purported formation of the contract of insurance at the time of the application and the premium payment for the coverage, cannot therefore be sustained.

[56] I must further add for emphasis that not only must the terms of an insurance contract as stated earlier be construed in their ordinary, plain and natural meaning, which considering the cover note being part of the certificate of insurance must on this basis already lead to the conclusion that the policy became effective from 2.51pm on that day as so specifically stated in the cover note and where the same time and date of signature of the proposal was factually repeated in the Schedule.

[57] Not only that, for an insurance contract must also be interpreted to be in harmony with sound industry and commercial sense. This was made so plainly obvious by the High Court in *Syarikat Uniweld Trading v. The Asia Insurance Co Ltd* [1996] 3 CLJ 142; [1996] 2 MLJ 160 where Abdul Malik Ishak J (as he then was) held, as captured in the headnotes of the reported judgment as follows:

(i) An insurance policy should be construed in accordance with sound commercial principles and good business sense, so that its provisions receive a fair and sensible application (see p. 177E); *Martin (John) of London v. Russell* [1960] 1 Lloyd's Rep 554 and *Lowenstein (J) & Co v. Poplar Motor Transport (Lymm), Gooda (Third Party)* [1968] 2 Lloyd's Rep 223 followed.

(ii) The literal meaning of the words in the insurance policy must not be allowed to prevail where it would produce an unrealistic and generally unanticipated result such as to absolve the respondent as an insurer from liability on the chief risks sought to be covered by the insurance policy (see p 167E-G); *M'Cowan v. Baine & Johnston & Ors* [1891] AC 401; *M'Cowan v. Baine & Johnston & Ors* [1891] AC 401; *Re Etherington and the Lancashire and Yorkshire Accident Insurance Co* [1909] 1 KB 591 and *Westminster Fire Office v. Reliance Marine Insurance Co* [1903] TLR 668 followed.

(iii) In interpreting any clause of an insurance policy, one must bear in mind the commercial object or function of the clause and its apparent relation to the contract as a whole. In adopting this approach, it becomes apparent that the literal meaning of the clause in the insurance policy must necessarily yield to business sense so that an ambiguity in the wording could be resolved (see p 167H-I); *Kearney v. General Accident Fire and Life Assurance Corp* [1968] 2 Lloyd's Rep 240 and *L Schuler AG v. Wickman Machine Tools Sales Ltd* [1974] AC 235 followed.

[58] As shown earlier, when considerations of the industry practice of "cash before cover" are taken into account, and the overriding public policy not to encourage road users to get insurance coverage only after the occurrence of accident is properly appreciated, and to also avoid making mockery of the *raison de etre* or essence of motor vehicle insurance, one cannot but conclude that sound commercial and business sense must mean that the argument propounded by the second defendant in the instant case on the retrospective effectiveness of the policy from midnight of the day in question notwithstanding premium payment only effected later in the afternoon, to be entirely fallacious.

[59] This conclusion is in any event resoundingly inevitable when provisions of the FSA, in particular s. 84 and Schedule 9 as earlier highlighted are taken into account, as they certainly should.

The Second Defendant Is Not Party To The Insurance Contract

[60] Another reason why the second defendant's arguments cannot succeed, which considering the context, is a secondary ground to the earlier analysis on formation of contract and payment of premium post-accident which should already demolish the case of the second defendant, is this.

[61] It is a basic rule of the law of contract that the rights and obligations concerning an agreement do not concern a third party. A third party like the second defendant cannot benefit from nor sue on the contract of insurance which existed between the plaintiff and the first defendant. This is a fundamental, as it is rudimentary basis that renders the second defendant's resistance to be short on substance.

[62] This court cannot countenance a departure from the well-entrenched rule in the law of contract that a third party can neither benefit nor suffer from a contract executed by other parties. A contract cannot be enforced against or by a third party (see the leading common law authority of *Tweddle v. Atkinson* [1861] 1 B & S 393 and the Privy Council decision in *Kepong Prospecting Ltd & Ors v. Schmidt* [1967] 1 LNS 67; [1968] 1 MLJ 170).

However A Third Party Has The Right To Oppose Under Section 96 Of The RTA

[63] However, this is not to say that the third party like the second defendant is entirely irrelevant to the proceedings before me on the application by the plaintiff to declare the policy to be void and enforceable under s. 96 of the RTA.

[64] Whilst this action by the plaintiff under s. 96 indeed concerns the contract of insurance to which the second defendant is not privy, the very scheme of s. 96 however, whilst enabling an insurer to seek a court declaration to avoid the relevant policy, also confers on the third party, like the second defendant in the instant case, who claimed to have been involved in an accident with a vehicle insured with the insurer under the relevant coverage, to apply to be made a party and to oppose the granting of such declaration.

[65] It is apposite that I reproduce the relevant parts of s. 96 of the RTA, as follows:

> 96. Duty of insurers to satisfy judgements against persons insured in respect of third party risks
>
> (1) If, after a certificate of insurance has been delivered under subsection 91(4) to the person by whom a policy has been effected, judgement in respect of any such liability as is required to be covered by a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgement any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgements.
>
> (2) No sum shall be payable by an insurer under subsection (1): ...

(3) No sum shall be payable by an insurer under subsection (1) if before the date the liability was incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable:

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgement obtained in proceedings commenced before the commencement of that action unless, before or within seven days after the commencement of that action, he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the grounds on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto.

... (emphasis added)

[66] Section 96(3) of the RTA clearly confers on the third party like the second defendant herein, such right to contest the declaration despite the patent absence of any contractual relationship between the plaintiff as the insurer and the second defendant as the third party.

[67] No clearer judicial pronouncement on the right of the third party under s. 96(3) has probably been made thus far other than by the Court of Appeal in a recent case of *Pacific & Orient Insurance Co Berhad v. Rasip bin Hamsudi & Ors* [2017] 4 CLJ 572, in the following terms:

[20] This interest of the first, second and third respondents was statutorily and expressly recognised by virtue of the terms of the proviso to s. 96(3) of the RTA. Any third party (like in this instance, the first, second and third respondents as plaintiffs) bringing a claim in court involving a vehicle (the subject of the mandatory third party risk insurance under RTA) was a recognised party named in the proviso to s. 96(3) as being entitled to be notified by the insurer (in this case the appellant) before or within seven days of the commencement of any proceedings under s. 96(3) to declare the relevant insurance policy to be void and unenforceable. Such notice, it would also be noticed, required the appellant to specify the grounds that would be relied on by the insurer in such an application.

Affidavit Evidence Of The Plaintiff Unchallenged

[68] Nonetheless, it is difficult to see in what manner the second defendant can succeed in their opposition to this action when evidence of the affidavits of the plaintiff, as the insurer stand unrebutted by any affidavit by the first defendant, being the insured at the relevant time. Most crucially, the very validity or effectiveness of the policy itself, for the myriad of the reasons stated earlier, is in doubt.

[69] An insurer's statutory liability arises when an insurer is legally bound under s. 96(1) of the RTA to pay a person who has died or who has suffered bodily injury in a motor accident, but such liability cannot arise if the insurer has obtained from the court before liability is incurred (in the form of the judgment against the insurer) a declaration that the insurance was void or unenforceable. This was what the plaintiff herein sought to and did achieve before this court for the reasons I have stated earlier.

[70] The second defendant has not demonstrated any fact (other than proffering the legal argument on the retrospective effectiveness of the policy) or other evidence relevant to the question of prejudice that would render any declaration by the court rendering the policy to be void to be unjust.

[71] In my view, the ends of justice in the balance of competing interests to be determined in the context of s. 96 of the RTA is better served, given the circumstances of the instant case, with the granting of the declaration avoiding the contract of insurance between the plaintiff and the first defendant.

[72] I must add that in such a case where the insurance contract is declared void under s. 96(3), the third party who is successful in the liability proceedings against the insured is not entirely without remedy. A third party who obtains judgment against a driver without any policy coverage or with ineffective policy such as where the insurance is obtained fraudulently or through misrepresentation or non-disclosure of material fact may look to the Motor Insurers' Bureau for some compensation payment under s. 91 of the RTA.

[73] In *Ahmad Nadzrin Abd Halim & Anor v. Allianz General Insurance Company (M) Bhd* [2015] 9 CLJ 821 it was stated by Lim Yee Lan JCA that:

> [33] Reading s. 91 together with the definition of "authorised insurer", it would necessarily mean that every insurance company carrying on a motor insurance business in Malaysia is a member of the motor insurers' bureau.
>
> [34] In this regard, the latest memorandum of agreement signed between the motor insurers' bureau and the Minister of Transport is the memorandum of agreement dated January 1, 1992 ("MOT-MOA"). Pursuant to the MOT-MOA, the Motor Insurers' Bureau ("bureau") had in turn entered into a memorandum of agreement ("insurers-MOA") of even date between the bureau and all the insurers of motor vehicle insurance which binds each of the insurers to the bureau and severally to each and every other of the insurers to perform the MOT-MOA.
>
> [35] Under the insurers-MOA, every insurance company in Malaysia has agreed in principle to provide insurance coverage in the following situations:
>
> (a) In the event the insurance is obtained fraudulently, or through misrepresentation, non-disclosure of material fact or mistake (clause 1(ii)).
>
> (b) in the event the vehicle is under the control of an "unauthorised driver" (clause 1(iv)) and
>
> (c) in the event the ownership and or interest in a vehicle had changed hands (clause 1(vi)).

[36] Clause 2 of the MOT-MOA provides that the bureau will consider to make at its absolute discretion, compassionate payments or allowances to persons injured and to the dependents of persons killed in the accident through the use of motor vehicles which do not have in force any policy of insurance as required by Part IV of the Act or where such a policy is ineffective for any reason other than the inability of the insurer to make payment.

[37] Clause 4 of the MOT-MOA allows the bureau or the insurer (who has paid on behalf of the bureau) to recover any sum paid under clause 2 of the MOT-MOA against the policyholder or any other person.

[38] Based on the foregoing provisions in s. 91, it is clear that a third party who obtains judgment against an uninsured driver and or registered owner of a vehicle by virtue of its cancellation or repudiation by the insurer can look to the bureau for satisfaction of the judgment sum, although as we understood it, not to the full extent but in practice up to 75% of the judgment sum.

Conclusion

[74] For the reasons that I have discussed in the foregoing, it is my judgment that the plaintiff has successfully established its case for the declaration under s. 96(3) of the RTA that the policy with the first defendant concerning the vehicle is void and unenforceable.

[75] I therefore allow encl. 1, with costs.